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424-310—71

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1553

JOY M. CHANDLER CARPENTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 26–27) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1971 (Pet. 26) and a petition for rehearing was denied on March 10, 1971 (Pet. 28). The petition for a writ of certiorari was filed on April 7, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conviction should be reversed because of alleged hearsay testimony received from certain government witnesses.

2. Whether the trial court erred in admitting, with regard to bias of a defense witness, the details of the charges pending in an indictment against that witness.

3. Whether the trial court erred in admitting a summary by the government's expert accounting witness.

4. Whether the prosecutor's summation created reversible error.

5. Whether the five handwriting examples used by the government's handwriting expert were properly authenticated.

STATEMENT

After a jury trial, petitioner was convicted on four counts charging perjury, on one count charging a willful attempt to evade her 1964 income tax in violation of Section 7201 of the Internal Revenue Code of 1954, and on one count of falsely making and subscribing her 1964 income tax return in violation of Section 7206(1) of the Code. The indictment alleged that petitioner's return reported her taxable income as $6,756.66 whereas the true amount was $58,756.66. Petitioner was sentenced to serve a total of ten years in prison.

The evidence to support the verdict may be summarized as follows:

In 1963 and 1964, petitioner was employed at the Pecos Abstract Office in Pecos, Texas. In September 1963, an employee of one Meeker advised petitioner that he had learned of some unleased land which belonged to Victor E. Brookfield. Meeker's employee advised petitioner that Meeker would pay her a commission if she could assist in acquiring for Meeker an oil and gas lease from Brookfield. Petitioner stated

that she would do so, adding that some people were of the opinion that Brookfield was of unsound mind. (R. 13–15, 18). Later, petitioner advised Meeker's employee that Brookfield was interested but that he would not sign the lease in front of a group of people (R. 21, 25).

Petitioner stated that the parties agreed upon a price of $118,000 and that she accompanied a man to the office of a notary public to sign the mineral deed. There was testimony that the man accompanying petitioner was not Brookfield but petitioner's brother-in-law, J. Walter Henson. (R. 287–291.) A handwriting expert testified that the signature "V. E. Brookfield" on the mineral deed (Govt. Ex. 2) was not in the handwriting of Brookfield (R. 189, 191–195) but had been traced from the signature on Government Exhibit 28, a letter written earlier by Brookfield and admitted in evidence at a hearing on his sanity in 1963 (R. 134–136).

As consideration for this mineral deed, Meeker issued a check dated February 3, 1964, payable to Brookfield in the amount of $118,000 (R. 26). Meeker's employee gave this check to petitioner on the afternoon of February 2, 1964 (R. 26). The endorsement of the name "V.E. Brookfield" on the check (Govt. Ex. 3) was a forgery, according to the government's expert, and had also been traced from the signature of Brookfield on Government Exhibit 28 (R. 202). Petitioner had testified before the grand jury that she saw Brookfield endorse the $118,000 check (R. 53) and that she saw him sign the mineral deed (R. 285–286), and these two statements were the basis of the first two perjury counts.

On or about February 3, 1964, Victor E. Brookfield disappeared and has never been found, despite a search for him by the Texas Rangers (R. 49, 92–93, 131–133, 164–165). No one except petitioner claims to have seen him since February 3, 1964.

Petitioner came into the Wynnewood State Bank in Dallas with a man on February 3, 1964, and told a bank employee named Mary Cahill that they wanted to open an account with a check for $118,000 (Govt. Ex. 3; R. 56–57). Petitioner did all the talking, and the man, whom she represented to be Victor E. Brookfield, was silent (R. 59–60). Mrs. Cahill gave them signature cards to sign for two accounts entitled "Brook-Chan Properties" and "V. E. Brookfield". Petitioner signed her cards but stated that "Brookfield" would sign his at a later date, explaining that "Brookfield" was very timid (R. 59–62). Signature cards returned by mail at a later date and purportedly signed by Brookfield were forgeries (R. 197). The man who accompanied petitioner to the bank was not Brookfield but J. Walter Henson (R. 73–75, 272–277, 309–313).

On February 4, 1964, an agent of Meeker gave petitioner a cashier's check in exchange for the original $118,000 check purportedly bearing V. E. Brookfield's endorsement (R. 63–64). A deposit of $50,000 was made in the account known as Brook-Chan Properties and one for $68,000 was made in the checking account in the name of V. E. Brookfield (R. 65). The Brook-Chan account could be drawn against either by petitioner or by Brookfield (R. 6, 61–62, 65–66).

After a long series of complex transactions involving these two bank accounts and other accounts opened at later dates, $52,000 of the funds were in petitioner's hands; $20,000 stemmed from the $50,000 in the Brook-Chan Properties account (R. 389) and the remaining $32,000 stemmed from the $68,000 originally deposited into the V. E. Brookfield account (R. 67–70, 384–385, 389–390). None of this money, which she received in 1964, was reported on her income tax return and the additional tax attributable to this $52,000 was $12,130.31 (R. 390).

Petitioner, testifying at the trial, claimed that she had turned the entire $52,000 over to Brookfield (R. 631–642). However, petitioner is the only person who even claims to have seen Brookfield after February 3, 1964, and she had no receipts or other documents to support her testimony. In a subsequent lawsuit against petitioner by the mother of Victor E. Brookfield, the amount of $43,000 was found and recovered from petitioner (R. 352–353).

The last two counts of the perjury indictment, of which petitioner also was found guilty, alleged that petitioner lied before the grand jury (before which she had appeared at her own request) when she testified (1) that her brother-in-law, J. Walter Henson, was not at the Westerner Motel in Dallas on the night of February 2, 1964; and (2) that she did not go to Ojinaga, Mexico, with Pete Gomez in February, 1964. The issues raised in the petition do not require elaboration of the evidence which supports the guilty verdict on these two counts.

ARGUMENT

1. There is no substance in the argument (Pet. 6–10) that the conviction should be reversed because of the introduction of hearsay evidence.

(a) Ex-Sheriff Hopper testified without objection that Brookfield's mother, since deceased, had contacted him early in 1964 "and at that time she did talk about Victor being gone" (R. 168). Petitioner's decision to withhold any hearsay objection precludes her present complaint. *Diaz* v. *United States,* 223 U.S. 442, 450.

(b) Witness Elmore testified without objection that on the night of February 2, 1964, he was night clerk at the Westerner Motel in Dallas and that he registered petitioner and J. Walter Henson (as "Hicks") in separate rooms during that night, and that after Henson registered he made a phone call through the switchboard to petitioner in another room (R. 98–101, 103). Petitioner points to no hearsay testimony from Elmore, but the motel manager, McDaniels, testified, again without objection, that on February 3, 1964, he was told by Elmore of the phone call from Henson to petitioner (R. 116–119). The insignificant nature of this corroborative testimony and the lack of objection preclude petitioner's present complaint.

(c) Witnesses Nance, Crowder and Wood were Texas Rangers who testified to their fruitless search for Brookfield in 1964 (R. 92–93, 131–133, 164–165). The disappearance was indisputably established by other evidence; in addition, Brookfield's absence was a negative fact essential for the government to prove,

and was properly proven by such evidence as this. II Wigmore, *Evidence* (3d ed.) Sec. 664.

(d) The testimony of Loving County (Texas) Court clerk Edna Clayton was pertinent only to the issue of foundation proof for handwriting exemplars, and is discussed in that context *infra.*

2. The trial court did not err in admitting, on the issue of Henson's bias as a defense witness, cross-examination as to charges pending against him in a perjury indictment (see Pet. 10-12). Henson testified at the instant trial that he was not in Dallas on February 3, 1964, when the mineral deed was notarized and the $118,000 check was presented to the bank in Dallas (R. 747) and further that he did not register as a guest at the Westerner Motel in Dallas on February 2–3, 1964 (R. 748). On cross-examination the government was permitted to show, on the issue of the interest and bias of the witness (R. 752, 808), that he was under indictment for perjury with respect to these same three matters (R. 752–753). The judge made it clear on two occasions that "the indictment doesn't mean [he] is guilty" and that evidence of it was admitted solely to show the interest Henson had in his own testimony (R. 752, 808). This ruling was plainly correct. Evidence of pending charges against a witness is admissible where, as here, it is allowed only for the limited purpose of showing bias, prejudice and motive of a witness. *Luna* v. *Beto,* 395 F. 2d 35, 38 (C.A. 5), certiorari denied, 394 U.S. 966; *Terminal Transport Co.* v. *Foster,* 164 F. 2d 248, 249 (C.A. 5).

3. Petitioner contends (Pet. 12–15) that the trial court erred in admitting an accounting summary by the government's expert witness. All of the evidence complained of was admitted without objection (R. 372–389). It was only at the end of the expert's testimony on direct examination that defense counsel interrupted and asked that the jury be specially instructed as to use of the summary (R. 389). The court later did so (R. 801). The jury could not possibly have been misled into the notion that it must accept the expert's conclusions from the evidence, *i.e.*, that the $52,000 represented income to petitioner. See *United States* v. *Johnson*, 319 U.S. 503, 519–520. Moreover, it was undisputed that the $52,000 had been traced into petitioner's hands; she admitted on the witness stand that she had received it (R. 631–642). The only issue was whether she had turned it over to Brookfield as she claimed (*id.*).

4. There was no objection to the prosecutor's summation at the trial, and this alone is fatal to petitioner's objection on appeal. *United States* v. *Kravitz*, 281 F. 2d 581, 586–587 (C.A. 3). Moreover, petitioner's counsel opened the door to the statements now complained of by improper arguments to the jury that a prosecution witness was mentally ill (Summations, p. 42), and that the state's failure to prosecute petitioner under state law for forgery proved that "the State of Texas does not believe that the Defendant in this case forged the name of V. E. Brookfield to that check" (Summations, p. 35). *Lawn* v. *United States*, 355 U.S. 339, 359–360, fn. 15.

5. There is no merit in the contention (Pet. 18–21) that the trial court erred in admitting the testimony of the government's handwriting expert because the examples written in the known handwriting of Brookfield were not properly authenticated. The expert testified (R. 189–202) that the signatures of Brookfield, on the mineral deed and on the $118,000 check, had been traced from the signature "V. E. Brookfield" on Government Exhibit 28, which was a letter produced from the Loving County (Texas) County Court file (R. 134) of an insanity proceeding in which Brookfield had successfully defended himself in 1963 against a petition by his mother (R. 16, 135) for the appointment of a permanent guardian. The Loving County Court clerk, who testified (R. 136) that in 1963 she heard Brookfield's testimony identifying Ex. 28 as his letter, also testified (R. 137–139) that on January 14, 1964, petitioner purchased copies of documents from the file in those proceedings which bore Brookfield's signature and that petitioner, while in the clerk's office, was observed making tracings of Brookfield's signature from documents in that file (R. 141–142). Thus, the foundation for this tracing aspect of the expert's testimony was amply established by proving the identity of the document from which the tracing was done, and by showing that petitioner was connected with that tracing.

This same Loving County Court clerk testified that she saw Brookfield subscribe his name "Victor Ely Brookfield" to Government Exhibit 29, a demand for jury trial (R. 139–140). Petitioner has not challenged the authenticity, as examples, of that document or of the

signature "Victor E. Brookfield" on Brookfield's 1961 income tax return (Govt. Ex. 29–C). The other two challenged standards were initials "V.E.B." on a 1963 letter to an oil company (Govt. Ex. 29–B) and the signature "Victor" on a letter received on January 21, 1964 by Brookfield's mother (Govt. Ex. 3–B; R. 139). The government's expert gave his opinion that all five examples were written by the same person (R. 189, 197, 209). It is plain that, in its ruling on the preliminary question of the admissibility of the examples, the district court did not abuse its discretion, and that those examples were an adequate foundation for the expert's opinion (R. 189, 191–195) that their author did not sign the mineral deed or the $118,000 check.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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